In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Chapter 11 Case
TPI INTERNATIONAL	)	
AIRWAYS, INC.	)	Number 91-20162
	)	
Debtor	)	

ORDER ON DEBTOR'S MOTION TO EMPLOY PROFESSIONAL PERSONS OR ENTITIES

This matter comes before the Court on Debtor's Motion to Employ Professional Persons or Entities. A hearing on the Motion was held in Brunswick, Georgia, on June 8, 1995, after which the Court took the matter under advisement. For the reasons set forth below, Debtor's Motion will be granted.

On April 24, 1995, TPI International Airways, Inc. ("TPI") filed a Motion to Employ Professional Persons or Entities, seeking approval to employ Allen David Tucker, Esquire, and a consulting firm known as IFR, Inc, to prosecute two different lawsuits on its behalf. The Motion recites that Debtor, through its President, Mr. Fred Catchpole, executed

an agreement on March 22, 1994, retaining Mr. Tucker as local counsel to prosecute a counterclaim in the Superior Court of Glynn County, Georgia against DHL/Air Polynesia. The Motion further recites that Debtor has already retained IFR, Inc. to pursue a claim against the United States Air Force which is based upon a breach of contract and other theories.

The DHL litigation has been settled for a sum of $52,500.00, which settlement was approved by Order of this Court entered April 7, 1995. The Air Force claim has already been tried before the Armed Services Board of Appeals, although a decision has yet to be rendered. Thus, Debtor is seeking retroactive or "*post facto*"[1] approval of its employment of Mr. Tucker and IFR, Inc., to which the United States Trustee objects.

Debtor offers the following reason for its failure to make timely application to employ Mr. Tucker and IFR, Inc.: In the early stages of this Chapter 11 case, Debtor had worked out an arrangement with its primary secured creditor, NMB Post Bank Groepe, which allowed Debtor to retain 50% of any recovery from Debtor's pursuit of the DHL, Air Force and other potential causes of action that it possessed. Debtor believed this to be a favorable arrangement in view of the fact that NMB's perfected first-priority security interest in essentially all of Debtor's assets would entitle NMB to all of the proceeds derived from

[1] *See* In re Donald Jarvis, Joyce Jarvis, -- F.3d --, 1995 WL 238635, slip op. at n.2 (1st Cir. April 28, 1995).

these causes of action. Debtor's bankruptcy attorney also believed that, as part of this agreement, NMB had been granted relief from the stay as to these causes of action so that they were no longer part of the bankruptcy estate, and that Debtor was to act as a collection agent on behalf of NMB. Thus, Debtor's attorney did not deem it necessary to obtain court approval of its employment of Mr. Tucker and IFR, Inc. to pursue the DHL and Air Force claims. As noted in this Court's February 6, 1995 Order on Debtor's Disclosure Statement, however, Debtor's attorney's belief as to the status of these claims was incorrect: NMB did not obtain relief from stay and the claims remain property of Debtor's bankruptcy estate.

Thus, the issue confronting the Court is whether Debtor's bankruptcy attorney's misapprehension of the status of the DHL and Air Force claims forms a sufficient basis for approving Debtor's motion to employ Mr. Tucker and IFR, Inc. on a retroactive or *post facto* basis. There is little question that a bankruptcy court possesses the discretionary power to approve employment applications on a retroactive basis under section 327(a) of the Bankruptcy Code. *See e.g.*, Matter of A. Bayne and Billie V. Morgan, Ch. 11 Case No. 89-40074, slip op. at 4-6 (Bankr. S.D.Ga., Aug. 17, 1989) (Davis, J.); In re Donald Jarvis, Joyce Jarvis, -- F.3d --, 1995 WL 238635, slip op. at 5 (1st Cir. April 28, 1995); In re Singson, 41 F.3d 316, 319-20 (7th Cir. 1994); In re Land, 943 F.2d 1265, 1267-68 (10th Cir. 1991); In re F/S Airlease II, Inc., 844 F.2d 99, 105 (3d Cir. 1988), *cert. denied*, 488 U.S. 852, 109 S.Ct. 137, 102 L.Ed.2d 110 (1988); In re THC Fin. Corp., 837 F.2d 389, 392 (9th Cir. 1988);

In re Triangle Chems., Inc., 697 F.2d 1280, 1289 (5th Cir. 1983). Most courts, however, require an applicant to "demonstrate both the professional person's suitability for appointment and the existence of *extraordinary circumstances* sufficient to excuse the failure to file a timely application." Jarvis, *supra*, at 6 (emphasis added).[2] The Third Circuit suggests that the following factors, among others, be considered by a bankruptcy court faced with the task of determining the presence of extraordinary circumstances:

> [W]hether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; [and] the extent to which compensation to the applicant will prejudice innocent third parties . . ."

F/S Airlease II, 844 F.2d at 105-06 (*quoting* In re Arkansas, 798 F.2d 645, 650 (3d Cir. 1986)). *See also* Jarvis, *supra*, at 6 (adopting Third Circuit list of factors as useful checklist).

As to the question of suitability under section 327(a), both Mr. Tucker and

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[2] *See also* Land, 943 F.2d at 1267-68 (requiring showing of exceptional or extraordinary circumstances); F/S Airlease II, 844 F.2d at 105 (same); THC Fin. Corp., 837 F.2d at 392 (same). *But see* Singson, 41 F.3d at 319 (rejecting "extraordinary circumstances" requirement and adopting the "excusable neglect" standard contained in Bankruptcy Rule 9006(b)(1)).

IFR, Inc. were clearly qualified under section 327(a) to represent the Debtor at the time they were hired, and they remain so today. Although the question of whether extraordinary circumstances are present is more difficult, the Court is persuaded, after considering the factors listed above, that Debtor's misapprehension of the law and facts surrounding the status of the DHL and Air Force claims is a sufficient basis for approving employment of Mr. Tucker and IFR, Inc. on a retroactive basis.

First, counsel has stated, as an officer of the Court, that he believed the consent order entered into with NMB contained a provision abandoning the claims in question from the estate. In this belief he was in error. Nevertheless, it was a good-faith belief and the complexity of the case certainly lends itself to a measure of confusion, or lack of precise memory of all the details of what was a very detailed order. Moreover, the consent order in question was entered approximately two years prior to the time that Debtor's president hired IFR and Tucker, compounding the lack of precise recollection. None of this is to excuse the failure to study the precise terms of the order to insure that one's recollection is correct, or to seek court sanction for an interpretation of that order. However, it illustrates the reasonableness of counsel's good faith.

Second, the professionals employed are well-qualified and would have been approved, at the time they were retained, had a timely application been filed. *See* Morgan,

supra at 6. Were they now found to be lacking in the qualifications necessary to be appointed, all their services would go uncompensated. They have been working at all times "at risk" for their fees in the absence of Court approval, but being otherwise qualified, should not be penalized for this reason alone.

Third, and perhaps most important, the Court in F/S Airlease enumerated, as one of the factors in finding "extraordinary circumstances," the question of "the extent to which compensation to the applicant will prejudice innocent third parties." In other words, in exercising the Court's discretion, perhaps the most critical factor is whether the unapproved professional has accrued large sums of fees and expenses which have covertly depleted the debtor's estate, to the detriment of creditors who have had no opportunity to question the desirability of the employment, and without Court sanction. In another case, this factor alone would be sufficient to deny an untimely application, or refuse to approve pre-appointment fees. However, in this case, both fee arrangements are contingent. The Debtor has not incurred and will not incur any liability to either professional unless and until there is a recovery. There is no economic loss or prejudice to the estate or its creditors. Finally, since the Court retains the right to set the amount of all fees until the time of a specific application, "there is no possibility of overreaching" in the collection of these fees at the end of the case. Morgan, *supra* at 6. In light of the foregoing discussion, I exercise the discretion vested in me and find that "extraordinary circumstances" exist and the failure

to file an earlier application could and should be excused.

Accordingly, IT IS THE ORDER OF THIS COURT THAT Debtor is authorized to employ Mr. David Allen Tucker as local counsel in the DHL/Air Polynesia suit on a retroactive basis;

IT IS THE FURTHER ORDER OF THIS COURT THAT Debtor is authorized to employ IFR, Inc. for the prosecution of its claim against the United States Air Force;

IT IS THE FURTHER ORDER OF THIS COURT THAT all fees will be determined by this Court upon the filing of an application and after notice and hearing.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of June, 1995.